



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

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July 12th, 2000

Minutes of the July 12th, 2000, meeting of the Commission on Governmental Ethics and Election Practices held in the Commission Hearing Room, 242 State Street, Augusta, Maine.

Present: Chairman: Peter B. Webster; Members: Hon. Michael Carpenter, Hon. Virginia Constantine, Dr. Linda W. Cronkhite, and Hon. Harriet P. Henry; Director William C. Hain, III; Counsel Phyllis Gardiner, Esq.; and Commission Assistant Diana True.

Chairman Webster called the meeting to order at 9:03 a.m.

In keeping with its practice of addressing agenda items to accommodate those personally present first, the Commission considered items on the published agenda as follows:

Agenda Item #2: "Leadership" Political Action Committees (PACs)

This issue was tabled from the June meeting pending the Commission's receipt of a legal opinion from Commission Counsel Gardiner addressing the issue whether the Maine Clean Election Act (MCEA) included any provision that would prohibit the association of a certified Maine Clean Election Act candidate with a so-called "leadership" PAC that otherwise did not benefit the candidacy of that individual for election to the Legislature in contravention of the provisions of the MCEA.

Ms. Constantine began the discussion by noting that, legalities aside, she believed the issue involved an ethical question for candidates, noting that others who testified also questioned whether the practice is "ethical" even though it may be determined to be "legal." She inquired whether the Commission's authority included providing guidance on the issue. She observed that the Maine Clean Election Act is called "clean" for a reason, and that its proponents promised "clean" elections. She stated her belief that taking money for PACs violates the concern for "clean" elections.

Judge Henry stated her opinion that "leadership" PACs maintained by MCEA candidates violate the spirit of the MCEA law; while it may be legal, she also questioned whether the practice is ethical.

Chairman Webster noted that the Commission does not have the authority to change the statute, only to interpret it in a way to be helpful to the public. The Commission may point out in correspondence an interpretation of the statute that may result in a more ethical application.

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Ms. Constantine observed that the annual report to the Legislature would afford the Commission an opportunity to bring this matter to the Legislature's attention and provide a means to recommend alternatives. She also suggested enhancing the audit of reports by MCEA candidates and their affiliated "leadership" PACs to ensure that no PAC funds are being used to inappropriately benefit the MCEA candidate's election efforts. Finally, she suggested that the Commission publish a list of those so-called "leadership" PACs with which MCEA candidates appear to be affiliated in the interest of full public disclosure.

Representative Thomas W. Murphy, Jr., stated that the majority of election money is raised and disbursed during the general election campaign. He stated his opinion that money that previously would have gone into a MCEA candidate's personal campaign finance account now will go into that candidate's "leadership" PAC, while the candidate gets public MCEA funding and the favorable publicity that accompanies running as a "clean" candidate.

Mr. Donald Bernard of Auburn stated his belief that lobbyists contribute to those who want to be in leadership. While so-called personal "leadership" PACs may be intended to influence the election of others, the law should be changed to prohibit the practice as inconsistent with the concept of the MCEA.

Following conclusion of the discussion and noting Commission Counsel's opinion, the Commission stated its consensus that the Maine Clean Election Act does not specifically prohibit MCEA candidates from being affiliated with so-called "leadership" PACs. However, they noted that the issue should be referred to the Legislature's attention as being of questionable consistency with the MCEA.

Agenda Item #5: Bissonnette Complaint

Ms. Geraldine Bissonnette's complaint questioned the adequacy of the disclosure provisions in Ms. Judy M. Carpenter's letter endorsing Ms. Rita Caron's candidacy for the House District 26 seat. Ms. Carpenter appeared before the Commission and explained the letter she had written to fellow South Portland Republicans endorsing Ms. Caron's candidacy. She stated her belief that she had complied with the attribution provisions, noting that the letter included her name and address and that the authorization of the candidate was clearly implied by the content of the letter, if not conspicuously noted thereon. After Ms. Carpenter answered questions, Judge Henry moved, Ms. Constantine seconded, and the Commission voted unanimously to assess a penalty of \$50 against Ms. Carpenter for failure to clearly and conspicuously state that her political communication expressly advocating the election of Ms. Caron had been authorized by the candidate.

Agenda Item #3: Inquiry Regarding Potential Conflict of Interest

This issue was raised at the June meeting by Commission Member Carpenter as a result of articles that had appeared in the Bangor Daily News regarding the potential for a conflict of interest involving Representative Joseph Bruno's employment affiliation and his legislative



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activities. Mr. Hain had provided to Members copies of relevant newspaper articles and Commission records regarding this matter.

Representative Thomas W. Murphy, Jr., suggested that the issue regards disclosure of sources of income by Legislators. He suggested that the due date for those disclosures should be changed from February 15 to early in December, the beginning of the legislative term, when the information would be more useful and Legislators would have more time to complete the form. Ms. Constantine suggested that the primary users of the sources of income information, members of the media, be consulted regarding any additional information that may be useful to be included in the form that is now missing.

The Commission determined that no further action on this item was required at this time.

Agenda Items #4 and #7: Impact of Unreported Independent Expenditures on MCEA Candidates in Primary Election

Mr. Hain reviewed the applicable provisions of the Maine Clean Election Act and the campaign finance reporting laws regarding the requirements for reporting independent expenditures and the requirement to include those expenditures when determining eligibility for matching funds under the MCEA.

James W. Case, Esq., appeared on behalf of the AFL-CIO, a membership organization, and summarized the legal arguments set forth more fully in a separate letter that he presented for the Commission's consideration. Essentially, Mr. Case argued that money spent by membership organizations to communicate to their members is excluded from the definition of the term "expenditure" by the campaign finance reporting statute. Since such communications are not "expenditures," they cannot therefore be "independent expenditures" and consequently do not have to be reported as such and should not be considered in determining eligibility for receipt of matching funds under the MCEA. At most, he argued, 21-A MRSA Section 1019(2) may require that membership communications expressly advocating the election or defeat of a specifically named candidate be reported, but not as "independent expenditures." He asserted that the AFL-CIO previously had tried to report such "membership communication expenditures," but had been told by former Commission staff personnel that such reporting was not required. Mr. Case also distinguished between the two communications initiated by the AFL-CIO. One, mailed June 6th, 2000, he characterized as a letter to members and did not expressly advocate the election or defeat of a clearly identified candidate. The other, mailed June 9, he conceded included language that may be construed as express advocacy.

Chairman Webster called a brief recess at 11:10 a.m. The Commission reconvened at 11:15 a.m.

Mr. Paul Madore addressed the Commission and explained from a losing candidate's perspective the implications of a third party's failure to report late minute independent expenditures on an MCEA candidate's ability to receive matching funds and to respond to voters regarding such last minute communications. He summarized a letter that he also provided for the Commission's



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consideration, including suggestions for the Commission's consideration to address the apparent shortcomings of these provisions of the Maine Clean Election Act.

Mr. Donald Bernard of Auburn addressed the Commission and compared the problems associated with last minute expenditures from the perspective of a traditionally-funded candidate compared to that of a publicly-funded candidate under the MCEA and the critical impact of the timing of last minute expenditures on the release of matching funds under the MCEA.

John Brautigam, Esq., Executive Director of Maine Citizens for Clean Elections addressed the Commission. He summarized the position of the original proponents of the Maine Clean Election Act. That position had not intended inclusion of communications by membership organizations to their members, even if expressly advocating the election or defeat of a specifically identified candidate, in the category of "independent expenditures" that may result in the provision of matching funds under the MCEA. He cited as support for that position the broad exception provided to membership organizations regarding communications to their members, generally, and the practice of reporting such expenditures separately that, he asserted, the Federal Elections Commission uses. Mr. Brautigam previously had provided an analysis of his position by separate correspondence to Commission Counsel Gardiner. He conceded that the language of section 1019(2) appeared to require the filing of some form of report of membership communications under very limited circumstances, but he rejected the characterization of those communications as "independent expenditures." Mr. Brautigam responded to a series of questions from Commission Members and Counsel regarding his interpretation of 21-A M.R.S.A. Sections 1012, 1019, and 1125. He concluded that under his organization's reading of those provisions, the communications at issue in this matter did not constitute "independent expenditures" that would trigger the release of matching funds under the MCEA.

Kurt Adams, Esq., appeared on behalf of the Maine Democratic Party. He noted that the Maine Democratic Party had supported the adoption of the MCEA through the referendum process and has largely supported its use by Maine Democratic Party candidates. He questioned whether the requirements of due process had been met and whether ample time to prepare arguments for this proceeding had been afforded to the parties. He also distinguished the members of the Maine Democratic Party from those of the AFL-CIO and stated his opinion that the latter group should be entitled to the exemption provided by the statute. He noted also the draconian nature of the penalty proposed for this first-time violation of the statute.

Mr. Carl Leinenon, Executive Director of the Maine State Employees Association, appeared on behalf of that organization. He professed a lack of understanding regarding the nature of the purported violation by MSEA. He argued that, since his organization had spent only \$84.66 on the "election" at issue here (Madore versus Rotundo); they had no obligation to report, certainly not within 48-hours of making the expenditure. He asserted the position that the language in the letter of May 19th, 2000 to the MSEA referring to the term "election" should be interpreted to mean each individual candidate's "election," rather than reference to the primary or general "election" in the aggregate. Counsel Gardiner responded that the campaign finance reporting statute provided a broader definition and that the issue had previously been resolved by opinion from the Attorney General.

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Ms. Allison Smith, Co-Chair of Maine Citizens for Clean Elections, addressed the Commission in support of Attorney Brautigam's assertion that the original proponents of the Maine Clean Election Act had not intended membership communications to be reported as "independent expenditures" because of their general exclusion from the definition of "expenditures." She noted that throughout the rulemaking process, no intent was expressed to include membership communications as "independent expenditures." She suggested that the Commission develop a separate form for the reporting of "membership communications" under the provisions of section 1019(2). She concluded that there has always been a common understanding within her organization that express advocacy membership communications are different from express advocacy advertisements in newspapers, for example, and since membership communications are explicitly excluded from the definition of "expenditure," they cannot be "independent expenditures."

Mr. Richard J. Traynor, Executive Director of the Maine Right to Life Political Action Committee, addressed the Commission regarding agenda item #4B, explaining the rationale his organization applied to the reporting requirement and why he believed that no report was required. He acknowledged the existence of the reporting requirement, but noted that it did not apply in his case because he had not spent over \$250 in the aggregate on express advocacy communications. He noted that his report is due on July 25th and would be submitted then. Mr. Hain concurred with that interpretation and recommended that no further action was warranted at this time.

Mr. C. Vincent Blais appeared on behalf of the Madore for Senate campaign and addressed the Commission regarding agenda item #4C. He summarized his previous correspondence to the Commission and the Secretary of State regarding the impact on Mr. Madore's campaign of the last minute communications by the AFL-CIO and the MSEA to their members. He noted specifically that the lateness of those communications and the failure to report them to the Commission resulted in Mr. Madore not receiving matching funds to which he may have been entitled and an inability to respond in a timely manner.

Chairman Webster observed that one of Mr. Blais' requests was to set aside the results of the election, but noted that the authorities of both the Commission and the Secretary of State are very limited with respect to election results. Counsel Gardiner suggested that Mr. Madore's only recourse may be to file a lawsuit in court challenging the results of the election based upon some violation of the law.

Mr. James J. Campbell, Sr., addressed the Commission regarding agenda item #7. He noted that he lost his election by 9 votes and believes the results were affected by the last minute "Election Alert" communication by the National Rifle Association endorsing his opponent. Douglas Hendrick, Esq., appeared on behalf of Mr. Campbell and questioned whether NRA Legislative Action, a political action committee that expressly advocates the election of specific candidates, should receive the benefit of the exception that might apply to the NRA as a "membership organization." He noted that while the definition of "expenditure" provided an exception for membership organizations, the definition of "contribution" did not.

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Chairman Webster called a brief recess at 1:25 p.m. The Commission reconvened at 1:45 p.m.

The Commission then began deliberation of action on agenda items #4 and #7. Regarding #7, Mr. Hain stated that he could not make a recommendation because he had insufficient information from the National Rifle Association upon which to determine whether a violation had occurred and, if so, the extent of that violation. He noted that the NRA had responded to his communications only the previous day, and that response included a general denial of liability and insufficient information upon which to proceed.

Mr. Carpenter inquired of Counsel Gardiner regarding the appropriateness of assessing penalties "by analogy" as proposed by Mr. Hain's recommendation. Counsel Gardiner noted a distinction between a maker of independent expenditures and an opposing candidate, suggesting that the latter may have a better reason to know of the reporting requirements than the former and, thus, have a greater penalty burden for a violation of the reporting requirements. However, she noted that the statutory penalty provisions apply not only to "candidates," but to all "persons," and would include organizations such as the AFL-CIO, the MSEA, and the NRA.

Ms. Constantine stated her opinion that the law is clear that a membership organization that expressly advocates the election of a specific candidate invokes the independent expenditure reporting requirement that may trigger the release of matching funds to an opposing MCEA candidate. She questioned whether a maximum penalty should be assessed, given the newness of the MCEA and the prior reporting record of the AFL-CIO. Mr. Carpenter noted that he was not prepared to reach the same conclusion, and Judge Henry suggested that additional time to review the large amount of materials may be helpful in reaching a conclusion.

Ms. Cronkhite moved and Judge Henry seconded to accept the staff recommendations regarding the penalties for the late submission of the two (2) AFL-CIO and the MSEA reports, but that motion was withdrawn.

Ms. Cronkhite moved and Judge Henry seconded to accept the staff recommendation regarding the penalty of \$352.64 for the late submission of the June 9th, 2000 expenditure report, but that motion was also withdrawn.

Mr. Carpenter moved, Ms. Constantine seconded, and the Commission voted unanimously to find that the letter of June 6th, 2000 (dated June, 2000) did not "expressly advocate" the election or defeat of a specifically named candidate and, therefore, no report was required based on that communication.

Judge Henry moved and Mr. Carpenter seconded to accept the staff recommendation regarding the penalty for the late submission of the June 9th, 2000 expenditure report. However, after discussion regarding the appropriate formula for computation of that penalty, given the previous action regarding the letter of June 6th, the previous motion was withdrawn. Judge Henry then moved, Ms. Constantine seconded and Members voted unanimously to table further consideration of agenda items #4 and #7 until the August meeting to enable review of all of the



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materials that had been presented and staff recomputation of penalty recommendations in light of the actions taken at this meeting.

Agenda Item #8: Newspaper Endorsements

Mr. Hain reviewed the correspondence initiated by Mr. Morrison Bonpasse questioning the appropriateness of “letters to the editors” in two House District 58 newspapers that appeared to be endorsements of Representative Kenneth Honey’s candidacy by “public officials” in their official capacities. Mr. Bonpasse addressed the Commission and essentially reiterated the assertions contained in his previous correspondence, suggesting that the “endorsements” were without apparent authority and arguing that there could not be an offense without an offender.

Mr. Kelly Willbank, University of Maine, addressed the Commission and stated that the letters at issue had been sent strictly as “thank you” notes to all Legislators, and that no authority had been given to use them for any other purpose.

Representative Kenneth Honey addressed the Commission. He asserted that he had never altered any letters; that he had talked to Mr. John Lisnik, Assistant to the Chancellor, regarding publication of the letters and had been told that they were his to use in any way he wanted. Representative Honey stated that his wife had taken the letters to Mary Brewer, editor of the *Boothbay Register*. He assumed they would be published as written, but certainly not as endorsements.

Ms. Constantine observed that what originated as “thank you” notes were made to look as though they were endorsements of Mr. Honey by someone. Mr. Carpenter questioned what license the *Boothbay Register* had to alter letters from their original form to make as endorsements.

Ms. Constantine moved, Mr. Carpenter seconded, and Members voted unanimously to table further consideration of this matter until the August meeting pending additional information from Mr. Lisnik, Mr. Diamond, and Ms. Brewer regarding their respective actions regarding this matter.

Agenda Item #9: Complaint by Mr. Arnold Woolf

Mr. Woolf addressed the Commission regarding the apparent failure by his House District 73 opponent to report an expenditure for a political communication on her campaign finance report, or the failure of the maker of an “independent expenditure” to so report, if the communication had been paid for by another person. Mr. Woolf acknowledged that he had been unable to obtain a copy of the communication at issue. Pending receipt of a copy of that document, Mr. Carpenter moved, Ms. Constantine seconded, and Members voted unanimously to table further consideration of this matter until the August meeting.



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Agenda Item #1: Ratification of Minutes

Mr. Carpenter moved, Ms. Constantine seconded, and the Commission voted unanimously to approve the minutes of the June 14th, 2000, meeting as distributed.

Agenda Item #6: Inquiry by Mr. Barry Watson Regarding Attribution Requirements

Mr. Hain reviewed correspondence from Mr. Watson questioning the absence of a statement of the source of payment for a political communication supporting Mr. Jim Moulton for Senate District 26 that appeared in *The Gray News*. Mr. Hain stated that he had received no response to his correspondence on the matter from Mr. Moulton. Mr. Carpenter moved and Ms. Constantine seconded to assess a \$100 penalty for failure to include the required "attribution" statement. Judge Henry proposed that the motion be subject to Mr. Moulton's appearing at the August meeting, but that amendment was withdrawn. Members then voted unanimously to approve the motion to assess a \$100 penalty.

Agenda Item #10: Staff Request for Clarification

Mr. Hain reviewed the factual circumstances wherein a prospective maker of independent expenditures to benefit a candidate may inadvertently and unintentionally cause the undesired result of instead making an "in-kind" contribution by merely communicating with the prospective candidate regarding any objection that person may have concerning the independent expenditure. The Commission concluded that a "communication," however minimal, could be construed as a "consultation." Therefore, any consultation between the candidate and the prospective maker of such independent expenditures would result in those expenditures no longer being "independent."

Agenda Item #11: Push-Polling Status

Counsel Gardiner briefed Members regarding the status of research on push-polling legislation in other states and with respect to constitutionality issues that is being conducted by an intern with the Attorney General's Office under her supervision.

There being no further business, on motion and unanimous vote, the Commission adjourned at 3:32 p.m.

Respectfully submitted,

William C. Hain, III
Executive Director